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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 288

SID W. RICHARDSON, ET AL, *Petitioners*

VS.

KEITH KELLY, *Respondent*

RESPONDENT'S REPLY TO MOTION TO RETAX COSTS

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Keith Kelly, Receiver.

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To the Honorable the Supreme Court of the United States:

At the time the parts of the record were designated for printing, the petitioners had not filed a designation of the points upon which they intended to rely. The duty devolved upon the respondent to designate for printing the portons of the record which might be material to the points that the petitioners *might* raise and which, likewise, might

be material to the points that respondent might advance in reply thereto.

The question of due process involved the propriety of the class suit device as a means of assessing the members of this reciprocal exchange. The propriety of the class suit depended upon the relationship between the members of that exchange. That relationship was governed by the reciprocal contracts used at the exchange, the powers of attorney and the insurance policies. The construction placed upon those instruments by the subscribers themselves in their applications to the Board of Insurance Commissioners for permits and in their sworn statements to the Board was material. The manner in which the exchange carried on its operations was material on this question. We designated additional portions of the record which we considered material to these issues.

Items 6 and 8 (R. 318-320, R 323-328) pertain to the reciprocal contracts and the insurance policies. Designations 12 through 15 (R. 351-365) and designation 17 (R. 366-370) deal with the nature of this reciprocal exchange and the regulations of the Board of Insurance Commissioners applicable thereto. Designation 18 (R. 371-382) deals with applications to the Board and sworn representations made to the Board. Designation 19 (R. 388) pertains to notices given by these subscribers to the Industrial Accident Board pertaining to their insurance. Designations 20, 21 and 22 (R. 388-418 and R. 420-434)

deal with the manner in which the exchange operated. Designation 24 (R. 482-492) and (R. 503-506) deals with the powers of attorney, subscribers agreements and policies of insurance held by the plaintiffs and intervenors and also deals with the nature of the operations (R. 506-508). Petitioner Gray's testimony was material because it was contrary to the theory on class suits urged in the application to this court (Designations 9-11, R. 347-351).

One answer to the petitioners' contentions regarding due process was that they had had their day in court in the instant proceeding; that in the instant proceeding the court reaffirmed the question of their liability as subscribers. It was thought that the rules of due process do not require that a party be given two chances to try his lawsuit, and the fact that the petitioners was accorded a full hearing below on the issue of their liability was a complete answer to the question of due process. This made it necessary that the record show the full hearing accorded them on the issue of their liability.

Those portions of the record pertaining to the liability of the subscribers were material for the further reason of showing the lack of substance in the petition for certiorari. This showed that the petitioners were arguing over merely a question of procedure. It showed that the judgment under attack was correct on the merits.

Petitioners' statement in their motion that they omitted "all portions of the record pertaining to the question of

meritorious defense" is an admission that their designation was insufficient. The question of meritorious defense cannot be separated from the nature of their reciprocal undertaking. As a matter of fact, the petitioners themselves, in their reply to respondent's brief, asked this court to construe their reciprocal undertaking (Reply p. 12).

The petitioners took the position that the original class proceeding was void because of the wrongful conduct of the receiver. They contended that the receiver prevented the class representatives from properly representing the class. This opened up the question of whether or not there was any defense on behalf of the class that could have been urged by the class representatives, thereby rendering material those portions of the record pertaining to defense.

In anticipation of the petitioners attack on the proceedings in cause No. 63621 and upon the receiver, and upon the plaintiff in that cause, and upon the class representatives, defendants in that cause, we considered it proper that the portions of the record pertaining to that proceeding be printed. This included the pleadings of the class representatives (Designations 2-4; R. 213-218; R. 608-652); it also included the testimony before the court in that cause (Designation 5; R. 219-240); (Designation 20; R. 388-400); (Designation 23; R. 449-472); and the exhibits introduced in the class proceeding (Designation 24; R. 472-480). This included the powers of attorney of the class representatives (R. 503-506) and the nature of

the operations of the exchange (R. 506-508). We also considered material the representations the subscribers made to the Board of Insurance Commissioners and the sworn statements in which they construed their contracts and stated the nature of their obligations upon which they obtained their permits; consequently, we designated such portions of the record (R. 700a-718; R. 720-728).

This evidence was material to the criticism directed at the class representatives because the assessment decree was in line with these sworn statements. The class representatives were bound by these statements, as well as the petitioners herein.

Petitioners severely criticised the receiver in their petition for certiorari. In anticipation thereof, we requested those portions of the record which might rebut this criticism. This included the receiver's applications to the court and the instructions issued to him by the court (Designation 23; R. 435-446) authorizing certain collections (R. 749); authority and order to compromise assessments (R. 736-739); and report of settlements and approval thereof (R. 741-746). The receiver's notice to all subscribers (R. 748b) issued long prior to the assessment suit, as well as his application to bring suit (R. 732) and the authority to do so (R. 734) are all material on the issue of whether or not the receiver was acting covertly as was charged. It was also material to show the nature of the proceedings that has been filed against the association (R.

690) and the fact that the subscribers had answered in that cause (R. 731). This evidence showed that the subscribers were in court in the original receivership proceedings and were required to take notice of the aforesaid orders and directions.

In this connection we also requested the record (R. 319-320) pertaining to the powers of attorney and petitioners' statement of the theory of their case. This shows that petitioners stated that the receiver based his suit upon a superseded power of attorney. This rendered material the record showing that this power of attorney was not superseded, but was being used by petitioners themselves (R. 482). Additional portions (R. 482-492) were material because they pertained to the policies of insurance held by the plaintiffs and intervenors. The testimony of the present receiver (R. 493-502) is material on the question of wrongful conduct and also on the question of the operation of the exchange and the state of its records. The letter and release (R. 698-699) threw a material light upon the receiver's dealings with Rogers and were therefore, material on the issue of wrongful conduct.

The failure of petitioners to designate the material portions of the record dealing with the aforesaid issues made necessary the request by the respondent. This respondent denies the designation of any unnecessary parts of the record for printing. He was commanded to designate the material parts of the record for the court's consideration,

Rule 38 (8). This record will show that your respondent cooperated with the petitioners in shortening the record by stipulating to the contents of 59 exhibits and to the omission of a large portion of the record below (R. 855-863).

WHEREFORE, your respondent prays that the motion to retax costs be denied.

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Keith Kelly, Receiver.